



**DEPARTMENT OF FAIR EMPLOYMENT  
AND HOUSING  
LEGAL DIVISION  
DIRECTIVE**

**DIRECTIVE NUMBER  
600  
DISTRIBUTION DATE  
April 20, 2016**

**1. SUBJECT: RESPONSE TO PUBLIC RECORDS ACT REQUESTS**

**2. PURPOSE:** To set forth the time frames and procedures for responding to requests for copying and inspection of records under the California Public Records Act (PRA). (Government Code § 6250, et seq.)

**3. BACKGROUND:** The PRA requires that the Department of Fair Employment and Housing (DFEH) respond to requests for copying and inspection of public records within specific time frames. "Public records" are materials containing information related to the conduct of the public's business which a government agency maintains. (Gov. Code, § 6252, subd. (e).) The PRA requires DFEH to specifically identify any exemptions that would prohibit the production of the record(s) or segregable portions of the record(s). (Gov. Code, § 6255, subd. (a).) Because DFEH receives complaints containing personal and other confidential information, DFEH balances the public's right to information with individual rights to privacy to prevent a "chilling effect" on persons who wish to file complaints with DFEH. (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4<sup>th</sup> 1008, 1018, 1024.)

**4. PROCEDURES:**

**A. General Rules**

- 1) The Custodian of Records<sup>1</sup> for DFEH is responsible for responding to general PRA requests. The Deputy Director of Communications<sup>2</sup> is responsible for responding to requests from the media or members of the Legislature or Congress.
- 2) The Chief Counsel shall designate an attorney in the Legal Division to advise staff regarding PRA requests. As necessary, DFEH staff responsible for responding to public records requests may refer questions to this attorney. This individual may consult with the DFEH staff responsible for

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<sup>1</sup> All subsequent references to DFEH's "Custodian of Records" are also meant to include his or her designee(s).

<sup>2</sup> All subsequent references to "Deputy Director of Communications" are also meant to include his or her designee(s).

creating the record in order to determine whether the record sought is exempt from disclosure under the PRA.

- a) Except as described in Section 4.A(5), below, the Custodian of Records shall consult with a designated DFEH attorney for complex public records requests or in any other circumstance where staff is unclear whether an exemption may be applicable.
- 3) Requests for the disclosure of information are often in writing. However, the PRA does not require a requestor to make a written request for the disclosure of information. Should the requestor not wish to provide a request in writing, the Custodian of Records will document the oral request. The documentation should include the specific request, date the request was made, and contact information if a response cannot be provided at the time of the request.
- 4) Prior to disclosing information, the Custodian of Records must determine the manner in which a request for records is being made, i.e., subpoena, letter, or e-mail. Where the request is in the form of a subpoena, the request will be handled by the Custodian of Records in accordance with Directive 603, "Response to Third-Party Subpoenas." A subpoena is not a PRA request.
- 5) The Custodian of Records must determine whether the request for information involves information that is in an open case file. An open case file is of two general types. The first type of open case file is one in which a complainant has made a pre-complaint inquiry and a complaint has not been signed, served, and filed. DFEH will withhold all information from a case in which a complaint has not been signed, served, and filed. (Gov. Code, § 6255.) The second type of open case file is one in which a complaint has been filed and there has not been a final resolution such as a case closure, final settlement in mediation, or final court judgment. Because releasing information regarding an open case file could compromise DFEH's investigation or mediation efforts, records from these files will not be released until DFEH closes the case. (Gov. Code, §§ 6254, subds. (c), (k), 6255; Evid. Code, §§ 1040, 1119.) In cases where a complaint has been filed and litigation is pending, records created during the pendency of the litigation will not be released until the pending litigation has been finally adjudicated or otherwise settled. (Gov. Code, § 6254, subd. (b).)
- 6) The Custodian of Records will provide reports to requestors seeking only limited information from open cases in which a complaint has been signed, served, and filed. This limited

information will include the dates of submission in DFEH's case management system, bases of complaints, types of harm, the names (of corporate respondents and public officials acting in their official capacity), and addresses (of corporate respondents and public officials acting in their official capacity). The Custodian of Records will only produce the names and addresses of corporate respondents and public officials acting in their official capacity.

- 7) When attempting to determine whether a pre-complaint inquiry has been made or a complaint has been filed by an individual or against a certain respondent, the Custodian of Records should locate the individual's or organization's name and alternative spellings of the name by:
  - a) Conducting a search on DFEH's file storage system. If necessary, this search should include DFEH's previous file storage systems.
  - b) Conducting a general internet search, using reliable sources such as the California Secretary of State "Business Search."
- 8) The Custodian of Records can release reports which summarize data or information in DFEH's possession.
- 9) When the Custodian of Records denies any request, the notification of denial of any request must be in writing. (Gov. Code, § 6255, subd. (b).) The denial must also include the names and titles or positions of each person responsible for the denial. (Gov. Code, § 6253, subd. (d).)

## **B. Fees for Records Requests**

- 1) For most public records requests, DFEH will not charge requestors. However, if the requestor specifically asks that DFEH provide records in paper format and the records that are responsive to this request amount to more than 10 pages, then DFEH will charge \$0.10 for each page.
- 2) DFEH will not usually charge for public records requests that seek records in electronic format. However, DFEH may charge the requestor for the cost of any programming and computer services necessary to produce a copy of a record under either the following circumstances:
  - a) The request is for a record that is only produced at otherwise regularly scheduled intervals; or

- b) The request requires data compilation, extraction or programming. (Gov. Code, § 6253.9, subd. (b).)
- 3) Payment of fees shall be made in the form of a check made payable to the "Department of Fair Employment and Housing." If DFEH does not receive payment within 30 days, the requestor must make a new records request.
- 4) DFEH may waive the costs associated with requests from members of the media or other individuals. (See, *North County Parents Organization v. Department of Education* (1994) 23 Cal.App.4th 144.)

### **C. Time Frame for Written Response**

- 1) The Custodian of Records must acknowledge the request in writing within ten (10) calendar days from the date DFEH receives the request. (Gov. Code, § 6253, subd. (c).) Specifically, the Custodian of Records must determine whether the request, in whole or in part, seeks copies of disclosable public records. (*Ibid.*) This determination must also include the estimated date and time when the records will be disclosed to the requestor. (*Ibid.*) This response must be in writing by e-mail. But if the e-mail address of the requestor is unavailable, the response must be by U.S. Mail.
- 2) If the Custodian of Records determines that the requestor is seeking disclosable public records, he or she must state the estimated date and time when the records will be made available. (Gov. Code, § 6253, subd. (c).)
- 3) In unusual circumstances, the Custodian of Records may extend the ten (10) day time limit for initial acknowledgement for up to fourteen (14) additional days. The Custodian of Records must provide written notice to the requestor if necessary to properly process the request. (Gov. Code, § 6253, subd. (c).) "Unusual circumstances" are defined as those instances where additional time is needed to:
  - a) Search and collect documents;
  - b) Search, collect, and examine a voluminous number of distinct records that are the subject of one request;
  - c) Consult with another agency having a substantial interest in the determination of the request; or

- d) Compile data, to write programming language or a computer program, or to construct a computer report to extract data. (Gov. Code, § 6253, subds. (c)(1), (2),(3).)
- 4) When the Custodian of Records seeks an extension, he or she must provide the reason(s) for the extension and the date on which DFEH will send a determination. (Gov. Code, § 6253, subd. (c).)

Whether the Custodian of Records has sought an extension or not, he or she must produce the documents within a reasonable period of time, generally within 20 days following receipt of payment.

#### **D. Content of Written Response**

- 1) The written response shall indicate whether DFEH has any of the requested records and, if so, whether they will be produced or are exempt from production in whole or in part under the provisions of the PRA. (Gov. Code, § 6253, subd. (c).) In the event no records exist which are responsive to the request, the Custodian of Records will prepare DFEH's "Certification In Response to Public Records Request," and send it to the requestor. This form will be signed by the Custodian of Records and mailed the same day the determination has been made that no records exist. This form shall not be used as DFEH's response to subpoenas.
- 2) The written response shall specify any photocopy charges that are to be paid to DFEH prior to obtaining copies of the requested records. (Gov. Code, § 6253, subd. (b).)
- 3) If the public records request is unclear or the Custodian of Records is unable to identify the records that are requested with sufficient clarity, the Custodian of Records, rather than deny the request, will work with the requestor to draft a request that reasonably identifies the available record or records, to the extent reasonable under the circumstances as described below:
  - a) To identify records and information which are responsive to the request or to the purpose of the request, if stated.
  - b) Describe the information technology and physical location in which the records exist.
  - c) Provide suggestions for overcoming any practical basis for denying access to the records or information sought. (Gov. Code, 6253.1 subd. (a).)

- 4) If a public record is in an electronic format, DFEH must provide the record in the requested format if available. (Gov. Code, § 6253.9, subd. (a).)

#### **E. Manner and Content of Records Production**

- 1) The Custodian of Records shall review every document contained in the file requested for production or inspection prior to producing any information. This requirement also applies to records produced in electronic format.
- 2) A public record must be disclosed unless it is exempt under a specific exemption in the PRA. The Custodian of Records must specifically identify the exemption(s) under which a record, or portion of a record, is withheld. (Gov. Code, §§ 6253, 6254.) The PRA incorporates the many privileges or confidentiality provisions from other state and federal laws. (Gov. Code, § 6254, subd. (k).) There are hundreds of sections of California law that may apply depending on the type of public record in DFEH's possession. (See, e.g., Gov. Code, §§ 6275-6277.) Typical documents in DFEH files that are exempt from disclosure under the PRA include:
  - a) Records relating to unemployment compensation. (Gov. Code, § 6276.46.)
  - b) Records relating to workers compensation claims such as "individually identifiable information" which means any data concerning an injury or claim that is linked to a uniquely identifiable employee, employer, claims administrator, or any other person or entity. (Gov. Code, § 6276.14.)
- 3) In all other circumstances, the decision to produce a record, or segregable portion of that record, involves the balancing of the public's right to monitor the functioning of their government against an individual's constitutional right of privacy. (Gov. Code, § 6255.)
- 4) **Note:** It is always proper to release unredacted copies of a record to the provider of the document.
- 5) The Custodian of Records must consider the source of the record; the identity of the requestor; and the status of the requestor to determine what portions of the records are exempt from disclosure. For example, DFEH may provide to a complainant his or her social security number. However, DFEH cannot provide a third party the complainant's social security number. The guidelines to be used in

determining the portions of the record exempt from disclosure are set forth below.

#### **F. Records from Federal Entities and Through DFEH's Office of Compliance Programs**

- 1) All records received from the U.S. Equal Employment Opportunity Commission in the course of investigating a case must be withheld. (Gov. Code, §§ 6254, subd. (k) and 6255; 42 U.S.C. § 2000e-5 (b).) EEO-1 reports are not to be produced including, but not limited to, the federal identification number or other information that would identify the reporting entity included on an EEO-1 report. (Gov. Code, §§ 6254, subd. (k) and 6255; 42 U.S.C. § 2000e-8 (d),(e).)
- 2) All records received from the U.S. Department of Housing and Urban Development (HUD) in the course of investigating a case must be withheld. (Gov. Code, §§ 6254, subd. (k) and 6255; 24 C.F.R. § 115.308.) However, information relevant to DFEH's participation in HUD's Fair Housing Assistance Program (FHAP) will be produced. (24 C.F.R. § 115.308.)
- 3) Records received through an investigation conducted by DFEH's Office of Compliance Programs (OCP) are subject to the same guidelines stated in sections "F" and "G" of this directive. (Gov. Code, §§ 6254, subd. (k) and 6255; 2 C.C.R § 11116, subd. (b).) However, information involving trade secrets received through OCP will not be produced. (Gov. Code, §§ 6254, subd. (k) and 6255; 2 C.C.R § 11116, subd. (b).)

#### **G. Guidelines for Record Production: Third-Party Request**

- 1) The name of the complainant will be redacted unless it appears from the file materials that the complainant has already publicly disclosed the circumstances of his/her complaint. (Gov. Code, §§ 12962 and 6255.) Absent a determination that the complainant has publicly disclosed the circumstances of his or her complaint, the complainant's name and other identifying information will be redacted from records even when a requestor has provided the complainant's name. In order to protect the identity of complainants who have not publicly disclosed their complaints, DFEH may ask the requestor for the time frame in which the requestor believes the complainant filed a complaint with DFEH and provide complaints filed during that time period. The evaluation of whether the complainant has waived his/her right to privacy by publicly disclosing the circumstances surrounding the complaint will not be based on reference to any material not in the case file.

- 2) The name of an individual respondent will be redacted unless it appears from the file materials that the respondent's participation or involvement in the circumstances of the complaint have been publicly disclosed. (Gov. Code, § 6255.) The name of an individual respondent will not be redacted when the respondent is a corporation or a public employee acting in his/her official capacity.
- 3) The name(s) and/or other identifying information of any third-party witness(es) will be redacted unless the third-party witness is a public employee acting in his/her official capacity. (Cal. Const., Art. I, § 1; Gov. Code, § 6255.)
- 4) Home addresses, home telephone numbers, bank account numbers, social security numbers, driver's license numbers, and dates of birth for all individuals will be redacted. (Cal. Const., Art I, § 1; Gov. Code, § 6254, subd. (c).)
- 5) Personal information, the disclosure of which would constitute an unwarranted invasion of privacy, will not be produced. Specifically, all personnel/employment files, medical files, and banking/financial records will not be produced. (Gov. Code, § 6254, subd. (c).)
- 6) Any information gathered in the course of efforts to eliminate an unlawful practice through settlement efforts, such as conference, conciliation, and persuasion will not be produced. (Gov. Code, §§ 6254, subd. (k), and 12963.7; Evid. Code, § 1040.)
- 7) Records that reflect notes, memoranda, legal analysis, mental impressions, or legal opinions of any DFEH attorney will not be produced. (Gov. Code, § 6254, subd. (k); Code Civ. Proc., § 2018.030; Evid. Code, §§ 1040 and 952 et seq.)
- 8) Information that reflects an attorney-client communication with DFEH Legal Division staff will not be produced. Such documents are protected by the deliberative process privilege, the official information privilege, and the attorney-client privilege. (Gov. Code, §§ 6254, subd.(k) and 6255; Evid. Code, §§ 1040 and 952 et seq.)
- 9) Because disclosure could jeopardize pending and future investigations, information that reflects official information communications between DFEH Enforcement Division staff will not be produced. (Gov. Code, §§ 6254, subd. (k) and 6255; Evid. Code, § 1040.) Similarly, Investigative Guides will not be produced because they are also protected by the official information privilege. (*Ibid.*)
- 10) Records pertaining to pending litigation to which DFEH is a party will not be produced. Such documents are exempt from disclosure

until the pending litigation has been finally adjudicated or otherwise settled. (Gov. Code, § 6254, subd. (b).)

- 11) Preliminary drafts, notes or interagency or intra-agency memoranda that are not retained by DFEH in the ordinary course of business will not be produced, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure. Such documents may be exempt from disclosure under the deliberative process privilege, the official information privilege, and the attorney work product doctrine. (Gov. Code, §§ 6254, subd. (a), (k) and 6255; Evid. Code, § 1040; Code Civ. Proc., § 2018.030.) Preliminary drafts, notes or interagency or intra-agency memoranda that are retained by DFEH in the ordinary course of business may be disclosed if they are not exempt under the exemptions listed in this directive and in the PRA.
- 12) Records of investigations received from other state or local agencies for correctional, law enforcement or licensing purposes will not be produced. Such documents are exempt from disclosure. (Gov. Code, § 6254, subd. (f).)
- 13) Records that were provided to DFEH with a promise of confidentiality will not be produced. Such documents are exempt from disclosure. (Evid. Code, § 1040.) **Note:** The promise of confidentiality means DFEH agreed to keep the information confidential at the time it was received. A party cannot unilaterally designate information as confidential.
- 14) Records relating to a mediation conducted by the DFEH Dispute Resolution Division will not be produced. (Gov. Code, § 6254, subd.(k); Evid. Code, § 1119.)

#### **H. Guidelines for Record Production: Complainant/Complainant's Representative and Respondent/Respondent's Representative Request**

- 1) If the requestor provided, prepared, or received the document in an unredacted state, the document does not need to be redacted regardless of the information contained in the document. If none of the above applies, the document will be redacted as set forth below.
- 2) The name(s) and/or other identifying information of any third-party witness(es) will be redacted, unless the third-party witness is a public employee acting in his/her official capacity. (Cal. Const., Art. I, § 1; Gov. Code, § 6255.)
- 3) If the complainant or complainant's representative is the requestor, home addresses, home telephone numbers, bank account

numbers, social security numbers, driver's license numbers and dates of birth for all respondents and witnesses will be redacted. (Cal. Const., Art. I, § 1; Gov. Code, § 6254, subd. (c).)

- 4) If the respondent or respondent's representative is the requestor, home addresses, home telephone numbers, bank account numbers, social security numbers, driver's license numbers, and dates of birth for all complainants, witnesses, and any co-respondents will be redacted. (Cal. Const., Art. I, § 1; Gov. Code, § 6254, subd. (c).)
- 5) Personal information, the disclosure of which would constitute an unwarranted invasion of privacy, will not be produced. Specifically, all personnel/employment files, medical files, and banking/financial records will not be produced. (Gov. Code, § 6254, subd. (c).)
- 6) Any information gathered in the course of efforts to eliminate an unlawful practice through settlement efforts, such as conference, conciliation, and persuasion will not be produced. (Gov. Code, §§ 6254, subd. (k) and 12963.7; Evid. Code, § 1040.)
- 7) Records that reflect notes, memoranda, legal analysis, mental impressions, or legal opinions of any DFEH attorney will not be produced. (Gov. Code, § 6254, subd. (k); Code Civ. Proc., § 2018.030; Evid. Code, §§ 1040 and 952 et seq.)
- 8) Information that reflects an attorney-client communication with DFEH Legal Division staff will not be produced. Such documents are protected by the deliberative process privilege, the official information privilege, and the attorney-client privilege. (Gov. Code, §§ 6254, subd.(k) and 6255; Evid. Code, §§ 1040 and 952 et seq.)
- 9) Because disclosure could jeopardize pending and future investigations, information that reflects official information communications between DFEH Enforcement Division staff will not be produced. (Gov. Code, §§ 6254, subd. (k) and 6255; Evid. Code, § 1040.) Similarly, Investigative Guides will not be produced because they are also protected by the official information privilege. (*Ibid.*)
- 10) Records pertaining to pending litigation to which DFEH is a party will not be produced. Such documents are exempt from disclosure until the pending litigation has been finally adjudicated or otherwise settled. (Gov. Code, § 6254, subd. (b).)
- 11) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by DFEH in the ordinary course of business will not be produced, provided that the public interest in

withholding those records clearly outweighs the public interest in disclosure. Such documents may be exempt from disclosure under the deliberative process privilege, the official information privilege, and the attorney work product doctrine. (Gov. Code, §§ 6254, subd. (a), (k) and 6255; Evid. Code, § 1040; Code Civ. Proc., § 2018.030.) Preliminary drafts, notes or interagency or intra-agency memoranda that are retained by DFEH in the ordinary course of business may be disclosed if they are not exempt under the exemptions listed in this directive and in the PRA.

- 12) Records of investigations received from other state or local agencies for correctional, law enforcement, or licensing purposes will not be produced. Such documents are exempt from disclosure. (Gov. Code, § 6254, subd. (f).)
- 13) Records that were provided to DFEH with a promise of confidentiality will not be produced. (Evid. Code, § 1040.)  
**Note:** The promise of confidentiality means DFEH agreed to keep the information confidential at the time it was received. A party cannot unilaterally designate information as confidential.
- 14) Records relating to a mediation conducted by the DFEH Dispute Resolution Division will not be produced. (Gov. Code, § 6254, subd.(k); Evid. Code, § 1119.)

**5. APPROVAL:**



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Kevin Kish, Director

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April 20, 2016

Date